119

No. 08-858

Supreme Court, U.S.
FILED
FEB 9 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

JEANNE E. CALDWELL,

Petitioner,

v.

ROY L. CALDWELL, in his official capacity as Director of the University of California Museum of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. CARROLL*
(Bar No. 118106)
SCHIFF HARDIN LLP
One Market,
Spear Street Tower
Thirty-Second Floor
San Francisco, CA 94105
Telephone: (415) 901-8700
Facsimile: (415) 901-8701

**Counsel of Record*

CHARLES F. ROBINSON
(Bar No. 113197)
CHRISTOPHER M. PATTI
(Bar No. 118283)
UNIVERSITY OF CALIFORNIA
OFFICE OF GENERAL COUNSEL
1111 Franklin Street,
8th Floor
Oakland, CA 94607-5200
Telephone: (510) 987-9800
Facsimile: (510) 987-9757

Attorneys for Respondents
Roy L. Caldwell and David Lindberg

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent submits that the following question more accurately reflects the issue presented in the petition for a writ of certiorari.

Does an injury in fact sufficient to confer standing under Article III of the United States Constitution arise from a plaintiff's offense at references to religion on one page of an extensive government-run internet website where the references resulted in, at most, a *de minimis* impairment in the plaintiff's use of the website and do not otherwise affect the plaintiff?

PARTIES TO THE PROCEEDINGS

The petitioner is Jeanne E. Caldwell.

The state respondents are Roy L. Caldwell, Director of the University of California's Museum of Paleontology, and David Lindberg, Chair of the Integrative Biology Department at the University of California's Berkeley campus, each of whom are sued in their official capacities. For simplicity, these respondents will be referred to as "the University of California," or "UC."

The federal respondent is David Campbell, sued in his official capacity as Program Director for the National Science Foundation. The federal respondent will be referred to as "NSF."

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	8
I. THE NINTH CIRCUIT'S ANALYSIS INVOLVES THE FACTBOUND APPLICATION OF SETTLED LAW AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT	8
II. THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES IN HOLDING THAT PLAINTIFF LACKS STANDING TO PURSUE HER CLAIM UNDER THE ESTABLISHMENT CLAUSE	13
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 15

Baker v. Carr, 369 U.S. 186 (1962) 13, 15

Buono v. Norton, 371 F.3d 543 (9th Cir. 2004) 7, 16

Caldwell v. Caldwell, 420 F.Supp.2d 1102 (N.D. Cal. 2006) 1

Caldwell v. Caldwell, 545 F.3d 1126 (2008) 1

Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993) 7

Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989) 19

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 13, 14

McCray v. New York, 461 U.S. 961 (1983) 9

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 10

Saladin v. City of Milledgeville, 812 F.2d 687 (11th Cir. 1987) 19

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 14, 15, 20

School District of Abington v. Schempp, 374 U.S. 203 (1963) 7, 18

Separation of Church and State Committee v. City of Eugene, 93 F.3d 617 (9th Cir. 1996) 7

United States v. SCRAP, 412 U.S. 669 (1973) 14

TABLE OF AUTHORITIES – Continued

Page

Valley Forge Coll. v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) ..... *passim*

Vasquez v. Los Angeles County, 487 F.3d 1246 (9th Cir. 2007) 17, 20

Warth v. Seldin, 422 U.S. 490 (1975) 14

OPINIONS BELOW

The opinion of the district court granting the state respondents' motion to dismiss is not reported. It is set forth in the Appendix. (Pet. App. 18-37.) The opinion of the district court granting the federal respondent's motion to dismiss is reported at 420 F.Supp.2d 1102 (N.D. Cal. 2006). (Pet. App. 38-50.) The Ninth Circuit's opinion affirming each of these orders is reported at 545 F.3d 1126 (2008).

INTRODUCTION

The petition for certiorari does not raise any question that warrants review by this Court. The Ninth Circuit's October 3, 2008 Opinion ("Opinion") does not warrant this Court's consideration because it does not conflict with any decision by this Court, and petitioner does not allege that it creates a conflict with any federal court of appeals or state court of last resort. Petitioner argues that intervention by this Court is needed in order to fashion a new, more expansive test for determining whether an internet user who takes offense at religious references appearing on a government-run website has suffered an injury in fact sufficient to satisfy Article III standing requirements in Establishment Clause cases. The issue is a novel one. Indeed, petitioner fails to cite any other case, in any circuit, that has ever addressed it, despite more than a decade of explosive growth in the use of the internet. The petition improperly and

prematurely calls upon this Court to act now, despite this absence of any case law suggesting frequent occurrence or divisive treatment of this issue in the federal courts. Moreover, to the extent the issue of internet standing arises again in future Establishment Clause cases, it is readily and appropriately addressed through existing standing principles, as demonstrated by the Ninth Circuit's sound decision here.

STATEMENT OF THE CASE

In an effort to furnish primary and secondary school science teachers with a dynamic and comprehensive resource for teaching the science of evolution and the history of evolutionary thought, the University of California's Museum of Paleontology sought and received a federal grant to develop and maintain an education website known as "Understanding Evolution" ("UE") (http://evolution.berkeley.edu). The UE website, which consists of some 840 web pages addressing a myriad of topics relating to evolution, is accessible by teachers as well as members of the general public through the internet.[1] Visitors to the

[1] As the site itself states: "Understanding Evolution is a non-commercial, education website, teaching the science and history of evolutionary biology. This site is here to help you understand what evolution is, how it works, how it factors into your life, how research in evolutionary biology is performed,

(Continued on following page)

website may navigate through numerous subsites addressing topics ranging from detailed explanations of the mechanisms of evolution and the history of life on Earth, to scientific evidence relating to evolution, to the history of ideas, research, and contributors to the study of evolution. Petitioner has accessed the Understanding Evolution website through the internet. She contends that her review of one of the site's web pages caused her to take offense at content which she perceived to be in violation of the Establishment Clause, and which made her feel like an outsider. She asserts that these feelings amount to a cognizable injury in fact, sufficient to confer Article III standing to pursue her Establishment Clause challenge to the UE website. The district court disagreed, dismissing the complaint for lack of standing. The Ninth Circuit affirmed.

The focus of petitioner's complaint is a web page titled "Misconception: 'Evolution and Religion are Incompatible.'" This web page appears within the "Misconceptions" subsite which is part of "Understanding Evolution for Teachers," one of several subsites comprising the UE website. The teacher subsite sets out a broad range of resources for teaching evolution at the primary and secondary school levels, including extensive information regarding the subject of evolution, grade-appropriate lesson plans,

---

and how ideas in this area have changed over time." (http://evolution.berkeley.edu.)

classroom strategies, sample quizzes, and more. The "Misconceptions" subsite includes five separate web pages, each describing a different misconception concerning evolution, along with suggestions designed to assist teachers in addressing the misconception in the classroom. The web page at issue here addresses the misconception that religion and evolution are incompatible.[2] It explains that the perceived incompatibility arises out of a misunderstanding of the separate functions of science and religion, and suggests that it is not always necessary to choose between one or the other.[3] The page illustrates this concept with a drawing depicting a smiling scientist in a lab coat holding a fossil skull and shaking hands with a smiling cleric who is holding a book marked

---

[2] The page is titled "Misconception: 'Evolution and Religion are Incompatible,'" and is located at http://evolution.berkeley.edu/evosite/misconceps/IVAandreligion.shtml. An earlier version of the page is attached as Exhibit 2 to the Complaint. (Pet. App. 52.) Petitioner's unsupported assertion that the referenced text was changed "in response to this lawsuit" is inaccurate. (Pet. 5.)

[3] In short, the UE pages about which plaintiff complains provide a ***description*** of certain religious views about evolution, acknowledge the existence of religious objections to the theory and describe the positions of other religions that accept it. The "misconceptions" page counters the misconception that one always has to choose between science and religion and provides as a supporting reference, a hyperlink to a collection of statements by religious groups whose beliefs do not conflict with evolution. The page thus ***educates*** about the religious debate over evolution.

with a small cross.[4] The page includes a link allowing the reader to navigate to a separate web page titled "Voices for Evolution." The linked page, which is not part of the UE site, contains a number of statements from religious organizations supportive of evolution.

On October 14, 2005, petitioner filed a lawsuit against UC and NSF.[5] The complaint avers that the material on the UE site explaining that religion and evolution are not incompatible are "doctrinal statements," which are endorsed by UC, and which UC uses to "proselytize" public school students and the general public in violation of the Establishment Clause. Petitioner alleges that, as a parent of school age children and as a citizen who participates in school board meetings, debates, and elections, she makes use of the UE website to learn how UC recommends that public science teachers teach evolution

---

[4] Petitioner's focus on this single page, located within one of many subsites which themselves form a discrete section of the 840 pages comprising the UE website, belies her repeated attempts to magnify and distort its significance within the context of the larger site. Specifically, petitioner's assertion that this page was in furtherance of the University of California's "primary goal" of combating a minority of Christian fundamentalists has no support in the record, or otherwise. (Pet. 4.)

[5] The petition's assertion that "[b]ecause Caldwell cannot use the entire website unreservedly, she filed suit in federal court . . . " is misleading. (Pet. 9.) In fact, the complaint fails to allege any diminution of any kind in petitioner's use of the UE site.

to K-12 students in California.[6] Contending that she is offended and made to feel like an outsider by the site's content addressing the compatibility of religion and evolution, petitioner sought an injunction restraining publication of the UE website and a judgment declaring that inclusion of this content violates the Establishment Clause.[7] On March 13, 2006, the district court granted UC's motion to dismiss the complaint for lack of standing, concluding that petitioner had done no more than to allege a "generalized grievance," insufficient to establish the injury in fact required for standing under *Valley Forge Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982). (Pet. App. 18-37.) The district court subsequently dismissed the claims against NSF on this and other grounds. (Pet. App. 38-50.)

---

[6] The petition includes numerous factual assertions regarding petitioner which are nowhere to be found in the complaint, including the assertion that petitioner is "a biblical literalist," who "believes that the biblical account of origins is incompatible with Darwin's evolutionary account of origins;" and that she "is of the opinion that children in the public schools should not be taught that the Christian account of origin is compatible with Darwin's evolutionary account of evolution." (Pet. 7.)

[7] The petition's reference to petitioner's "discovery" that "the primary purpose of the entire Understanding Evolution website was to combat the 'influence of . . . Christian fundamentalists such as herself' " refers to new facts that do not appear in the complaint or anywhere else in the record, and which completely misrepresents the express and apparent educational purpose of the UE site. (Pet. 8-9.)

Petitioner appealed to the Ninth Circuit court of appeals. On October 3, 2008, the court of appeals issued a decision affirming the district court's judgment of dismissal of the complaint in its entirety. (Pet. App. 1-17.) The Ninth Circuit held that the harm asserted by petitioner to her interest in being informed about the teaching of evolutionary theory is too generalized and remote to confer standing. The court rejected petitioner's attempt to analogize her case with Ninth Circuit authorities addressing Establishment Clause challenges to the erection and maintenance of crosses on public lands. *See Buono v. Norton,* 371 F.3d 543, 547 (9th Cir. 2004); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993). The court held that petitioner's asserted interest in the content of the UE website is not sufficiently direct or differentiated to confer standing. It observed that, unlike the plaintiffs in *School District of Abington v. Schempp*, 374 U.S. 203 (1963), which acknowledged that parents had standing to challenge Bible readings in the classrooms attended by their children, petitioner made no claim that her children's teachers had incorporated any of the challenged content from the UE site into their curriculum or had otherwise exposed petitioner's children to it in the classroom. Rather, petitioner's objections to the content on the UE site

were in the nature of an abstract, generalized grievance, insufficient to sustain her standing to sue.[8]

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S ANALYSIS INVOLVES THE FACT-BOUND APPLICATION OF SETTLED LAW AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The petition identifies three reasons for review: 1) this is a case of first impression; 2) cases that implicate the Establishment Clause on government owned websites will occur in the future; and 3) formulation of a test is in the public interest. Each of these reasons arises out of the same flawed premise which presumes that, because there is bound to be a surge in future litigation alleging constitutional violations arising out of government websites, and because there is currently no "workable test" for determining standing to bring such litigation, this Court must act now to fashion such a test. Petitioner is wrong on both counts. There is scant evidence

[8] In a concurring opinion, Judge Fletcher elaborated on this rationale, concluding that petitioner's asserted injury is too *de minimis* to confer standing in view of, among other factors, the ease with which petitioner could avoid the offending web page while freely accessing the rest of the UE site, and the absence of any allegation that she would be subject to "frequent and regular" exposure to the offending page.

supporting the predicted surge in claims challenging internet-based content; indeed, the evidence is to the contrary. Moreover, the courts' examination of the standing issues presented in any cases that do arise is adequately guided by existing precedents and does not require formulation of a new standing test aimed at users of the internet.

First, in asserting this is a case of first impression, petitioner readily acknowledges there is no circuit conflict which requires resolution by this Court, and so concedes the absence of the criterion that most frequently results in the granting of certiorari. *See* Sup.Ct. R. 10(a); Robert L. Stern, et al., Supreme Court Practice 225-32 (8th ed. 2002). *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (Certiorari denied where the issue requires further study in the lower courts before it is addressed by this Court).

Next, petitioner asserts that – despite the lack of such litigation to date – the future will bring a spate of cases alleging web-based Establishment Clause violations in sufficient numbers to justify this Court acting now to fashion a new, "workable" standing test for such cases. Petitioner's prediction lacks any empirical support, and is undercut by her own concession that not a single reported decision has arisen in the decade of explosive growth in the internet which preceded the instant case – or (excepting the district court and Ninth Circuit decisions here) in the three years which have elapsed since this case was filed. This prediction is further undermined by

petitioner's failure to cite any case addressing an Establishment Clause challenge aimed at "older forms of communications" such as government-produced books or pamphlets. (Pet. 9, 14-15.) For well over 100 years, the government has had the capacity to "display" photographs of crosses, the Ten Commandments or other religious symbols in books or other printed materials – and has presumably done so innumerable times. Petitioner fails to explain why publication of such material on the internet now is likely to spawn a multitude of Establishment Clause challenges, when publication of similar material in traditional media throughout the past century has not. In short, the issue framed in the petition is novel and is likely to remain so. The infrequency with which that issue arises makes quite clear that it is of insufficient legal or practical importance to justify review by this Court. "[A]cademic or episodic debate" does not warrant the granting of certiorari. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955).

Even if one assumes that a surge in Establishment Clause challenges to web-based content is to occur in the future, petitioner utterly fails to explain how this justifies review of the court of appeal's decision at this time, before other courts have addressed the standing issue in this context. As discussed below, the Ninth Circuit's analysis is sound and consistent with the long-standing precedents of this Court. There is no reason to assume that different circuits would reach differing outcomes on facts similar to those presented here. In the unlikely event

conflicting circuit court decisions do arise at some future point – and those differences are attributable to something other than the fact-bound application of settled standing principles – there could conceivably be a basis for seeking resolution of the conflict by means of review by this Court. Until such time, the lower courts – to the extent they are presented with the issue at all – can and should be given the opportunity to develop further precedents addressing the many and varied factual contexts within which Establishment Clause challenges to web-based content may occur.

As a third reason justifying review, petitioner broadly refers to "the public interest" in formulating a test to determine how Article III standing applies to a government website. Here, petitioner relies upon a false dichotomy, suggesting that the public interest requires this Court to develop a special standing rule for challenges to internet content "which avoids the two extremes in which either the whole world has standing or no one has standing." (Pet. 17.) First, no such rule is required. As amply illustrated by the court of appeals' decision here, resolution of standing issues in such cases may proceed by application of long-established precedents to the specific factual record presented. The court of appeals has not foreclosed the possibility that an internet user may, under other circumstances not alleged here, demonstrate an injury in fact sufficient to sustain standing. To the contrary, it explicitly acknowledged that possibility. (Pet. App. 16-17 (Fletcher, J., concurring).)

Moreover, as noted, petitioner's inflated characterizations as to the importance of fashioning a new and broader rule designed to secure standing for internet users who wish to challenge the constitutionality of web-based content are belied by the complete dearth of existing case law addressing the issue.[9] To the extent such cases arise in the future, existing standing principals as announced by this Court in *Valley Forge* and elsewhere and as applied by the court of appeals here, are more than adequate to ensure achievement of the standing doctrine's core aim: ensuring the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends

---

[9] The stunning breadth of petitioner's proposed rule would essentially render *Valley Forge* a nullity by permitting unfettered access to the federal courts by any internet user who takes offense at a perceived violation of the Establishment Clause. Petitioner proposes a test in which standing is conferred upon ***any*** user of a website who uses it for its intended purpose and who is offended by religious content on the site which purportedly runs afoul of the Establishment Clause. No consideration whatever is given to the user's interest or purpose in accessing the site, to the necessity (or lack thereof) for repeated viewings of the offensive material, or to the degree of diminution in the users' ability to use of the site. Rather where (as would be the case in most government-sponsored websites) the site is intended for viewing by the general public, ***any*** member of the public using the site who takes offense at the religious content would have standing. Petitioner's proposed test thus embodies the very essence of a "generalized grievance:" one that could be shared by anyone, anywhere in the country, at any time.

for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962).

II.

THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES IN HOLDING THAT PLAINTIFF LACKS STANDING TO PURSUE HER CLAIM UNDER THE ESTABLISHMENT CLAUSE.

Even if a mere plea for error correction could justify granting certiorari (and it cannot) the petition fails because the court of appeal's decision was plainly correct.[10] The court of appeals evaluated petitioner's claimed injury in fact under long-standing precedents from this Court and within the Ninth Circuit, and reached the sound conclusion that she had alleged nothing more than an abstract, generalized grievance, untethered to the particularized harm required to establish Article III standing.

To establish a "case-or-controversy" within the meaning of Article III, a plaintiff must show an "injury in fact," a causal connection between the injury and defendant's conduct or omissions, and a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504

---

[10] "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme Court of the United States, Rule 10.

U.S. 555, 560-561 (1992); *Valley Forge Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) (plaintiff's showing of a personalized injury in fact is an "irreducible minimum" requirement of Article III). The asserted injury must be both "concrete" and "particularized." *Lujan*, 504 U.S. at 560. To suffer a "particularized" injury means "that the injury must affect the plaintiff in a personal and individual way." *Lujan,* 504 U.S. at 560 & n.1; *see also United States v. SCRAP,* 412 U.S. 669, 689 (1973). The requirement of a particularized injury is essential to ensuring the proper allocation of power between our three branches of government. "Without such limitations," whether grounded in Article III or prudential considerations, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin,* 422 U.S. 490, 500 (1975).[11] The gist of the inquiry is whether the complaining party has "[a]lleged such a personal stake in the outcome of the

---

[11] This Court elaborated on this rationale in a case decided shortly before *Warth*: "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974).

controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v Carr*, 369 U.S. 186, 204 (1962).

Where, as here, the alleged harm to the individual consists of nothing more than the offense taken at a perceived violation of the Constitution, the "irreducible requirements" for standing are not met. This Court settled this question long ago, ruling that plaintiffs who sought to raise an Establishment Clause challenge to the transfer of federal property located in another state lacked standing, because they had failed to identify any injury beyond "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . even though the disagreement is phrased in constitutional terms." *Valley Forge Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-486 (1982); *accord Allen v. Wright*, 468 U.S. 737, 755-756 (1984) ("abstract stigmatic injury" insufficient by itself to create Article III injury in fact); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury). The Washington D.C.-based plaintiffs in *Valley Forge* learned through a news release that surplus government property had been transferred to a Christian college located in Pennsylvania, and subsequently challenged the transfer on Establishment Clause grounds. In holding that

plaintiffs had failed to establish standing by means of an injury in fact, this Court observed that it is not enough for a party to claim that the Establishment Clause has been violated; "[s]uch claims amount to little more than attempts to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Id.* at 483 (internal quotations and citations omitted). Since *Valley Forge*, it has been settled law that an individual who invokes Article III standing to pursue an Establishment Clause claim must identify an injury in fact which arises ***as a consequence*** of the alleged constitutional error, other than the psychological consequence produced by observation of the perceived unconstitutional conduct.

In an effort to meet this burden, petitioner has sought to draw an analogy to a line of cases addressing the display of religious symbols on government property, principally the Ninth Circuit's decision in *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). There, the Ninth Circuit held that a regular visitor to a federal Preserve in Arizona had standing to bring an Establishment Clause challenge to the maintenance of a Latin cross monument within the Preserve, holding that the plaintiff's asserted inability to freely use the public land in the vicinity of the cross constitutes a cognizable injury in fact. Petitioner argues that her asserted inability to "unreservedly" use the UE website without coming into direct contact with the challenged content also gives rise to a cognizable

injury, beyond the bare "psychological harm" alleged in *Valley Forge*.

The Ninth Circuit disposed of these arguments by means of a sound and straightforward application of existing precedents. In so doing, the court of appeals made clear that it was not fashioning a novel rule of "internet standing" to be applied in any and all cases raising Establishment Clause challenges to web-based content. Rather, the court considered the unique factual circumstances asserted by petitioner, including her individualized motives and interests in accessing the UE website, as well as the specific characteristics of the UE site itself, including its scope, purpose, and the context within which the challenged content is found.

Referring to the factual record before it, the court observed that petitioner's connection to the challenged content on the UE site was not as removed as the plaintiffs' in *Valley Forge*, but was more tenuous than Buono's encounter with the permanently installed cross maintained on the Preserve. (Pet. App. 12-13.) The court also distinguished petitioner's circumstances from those presented in *Vasquez v. Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007), where it had concluded that a county employee forced to have daily contact with a county seal which he regarded as an offensive anti-religious symbol had standing to challenge the seal under the Establishment Clause. Unlike petitioner's remote and limited use of the UE site here, the plaintiff in *Vasquez* had alleged membership in the community where the seal

was pervasively on display, so that he was forced into frequent, unwelcome, and direct contact with it. Thus, the Ninth Circuit concluded that because petitioner's connection to the challenged content on the UE site was more attenuated than in *Buono*, and not as concrete or forced as in *Vasquez*, she could not rely on those authorities in demonstrating that her concerns amounted to anything other than an "abstract objection" to that content. (Pet. App. 12-13.)[12]

Judge Fletcher elaborated on this rationale in her concurring opinion, where she noted petitioner's failure to allege that she "had any reason to visit the offending web page more than once." (Pet. App. 16.)[13]

---

[12] The court of appeal also contrasted the abstract nature of petitioner's objection with the parental objections raised in *School District of Abington v. Schempp*, 374 U.S. 203, 224 n.9 (1963). (Pet. App. 13-14; 14-15.) There, parents of children enrolled in public school objected to a Bible reading in the classroom that was mandated by state law. Unlike the *Schempp* plaintiffs, who were directly affected by the classroom readings, petitioner did not allege that the challenged content from the UE site was ever conveyed to her children in the classroom. Thus, as the concurring opinion concluded, "there is no allegation that Caldwell's children or Caldwell herself were 'directly affected' by the offensive content of the UE website." (Pet. App. 14-15 (Fletcher, J. concurring).)

[13] To the contrary, petitioner's stated reason for viewing the UE website – to learn about how the University of California recommends that public school science teachers teach evolution – belies any need for multiple or frequent viewings of the challenged content. Petitioner's failure to allege any such repeated or ongoing exposure to the offending display contrasts with the post-*Valley Forge* case law, where courts routinely cite ongoing or frequent exposure to the challenged display in

(Continued on following page)

Judge Fletcher further observed that the offense taken by petitioner in viewing the challenged "misconceptions" web page did not prevent her from freely using the rest of the 840 web pages comprising the UE site, "each of which can be viewed without having first viewed the offending page." (Pet. App. 16.) Indeed, the challenged "misconceptions" page represents a tiny fraction of the information available on the UE site, and is in no way essential or integral to the site's stated purpose in "teaching the science and history of evolutionary biology." (http://evolution.berkeley.edu.) As observed in the concurring opinion, because petitioner had no need for multiple viewings of the challenged "misconceptions" web page in order to learn about UC's recommendations on how evolution is taught, and because the challenged content represents an extremely limited portion of the site's offerings and is easily avoided, any diminution in petitioner's use of the UE site is *de minimis* and so cannot fulfill the purpose of the actual injury requirement in ensuring that "there is a specific

---

identifying the requisite injury in fact. *See, e.g., Buono,* 371 F.3d at 546 (former employee of federal Preserve where cross was displayed "now lives in Oregon" but "visit[s] the Preserve two to four times a year on average", and intends to relocate to Southern California or Arizona, and "make more frequent trips to the Preserve"); *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989) (injury arising out of viewing religious logo in City Hall "on a daily basis"); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (finding city residents had standing to challenge city seal containing the word "Christianity" where they "regularly receive" correspondence bearing the seal).

controversy before the court and that there is an advocate with sufficient personal concern to effectively litigate the matter." (Pet. App. 16-17 (Fletcher, J., concurring); (quoting *Vasquez v. Los Angeles County*, 487 F.3d at 1250).)

The Ninth Circuit's fact-based analysis lays to rest petitioner's current assertion that its ruling "would render all government websites immune from legal challenge by citizens." (Pet. 12.)[14] Indeed, the concurring opinion makes this point explicitly, observing that " . . . in certain cases the inability to access a government run website due to allegedly unconstitutional content may well confer standing." (Pet. App. 16-17 (Fletcher, J., concurring).) Future Establishment Clause cases challenging web-based content, if and when they are filed, may present different facts and circumstances sufficient to satisfy the injury in fact requirement. Petitioner's contrary assertions notwithstanding, nothing in the Ninth Circuit's decision forecloses that possibility.

---

[14] Even if this assertion were true, it does not mean that the Ninth Circuit erred in its conclusion that petitioner lacked standing here. "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974).

CONCLUSION

There is no compelling reason for this Court to grant certiorari. Petitioner makes no serious attempt to argue that any of the reasons set forth in Rule 10 exists. Instead, she unsuccessfully seeks to challenge the Ninth Circuit's sound application of firmly established standing principles to the facts presented. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Dated: February 9, 2009

WILLIAM J. CARROLL
(Bar No. 118106)
SCHIFF HARDIN LLP
One Market,
Spear Street Tower
Thirty-Second Floor
San Francisco, CA 94105
(415) 901-8700

Attorneys for Respondents
Roy L. Caldwell and
David Lindberg